

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 MARIO LOREN GORDON,) NO. ED CV 09-2004-SVW(E)
12 Plaintiff,)
13 v.) MEMORANDUM AND ORDER DISMISSING
14 TERESER A. BANKS, et al.,) COMPLAINT WITH LEAVE TO AMEND
15 Defendants.)
16 _____)
17

18 For the reasons discussed below, the Complaint is dismissed with
19 leave to amend. See 28 U.S.C. § 1915(e)(2)(B).
20

21 BACKGROUND
22

23 On October 28, 2009, Plaintiff, a federal prisoner, filed a civil
24 rights Complaint pursuant to 42 U.S.C. section 1983 against prison
25 officials at Plaintiff's place of incarceration, the Federal
26 Correctional Institution Victorville at Adelanto, California ("FCI
27 Victorville"). Defendants are: (1) Warden Tereser A. Banks;
28 (2) Captain Tellez; (3) Special Housing Unit Lieutenant J. Grimsley;

1 and (4) Senior Officers D. Walker and M. Caston. Plaintiff sues all
2 Defendants in their individual and official capacities.

3
4 Plaintiff alleges that, at approximately 11:25 a.m. on
5 October 11, 2009, in the Special Housing Unit ("SHU"), Defendant
6 Caston "put an unknown white pill" in Plaintiff's food, thereby
7 allegedly committing "attempted murder" (Complaint, p. 4). The pill
8 allegedly made Plaintiff ill and caused Plaintiff to require medical
9 attention (id.).

10
11 Plaintiff allegedly informed Defendant Tellez about "the serious
12 crime of criminal misconduct by staff members," but Tellez allegedly
13 stated that he was not going to intervene because it was not necessary
14 (id., attachment to p. 5, p. 2). Defendant Grimsley allegedly failed
15 to intervene, and allowed his staff to "continue to committ [sic]
16 criminal misconduct under his supervision" (id., attachment to p. 5,
17 p. 3). Defendant Walker allegedly told Plaintiff that he and his co-
18 worker were going to "come up with a better plan to poison
19 [Plaintiff]" (id., attachment to p. 5, p. 4). Plaintiff allegedly
20 submitted several written complaints to Warden Banks, who assertedly
21 refused to investigate the complaints in a proper manner (id.,
22 attachment to p. 5, p. 1).

23
24 Assertedly as a result of ingesting the pill, Plaintiff allegedly
25 suffered a weakening of his immune system, alteration in his sense of
26 taste, and an adverse effect on his "cognitive thinking and emotional
27 stability," which assertedly causes Plaintiff to suffer paranoia and
28 depression (id.). These problems allegedly have led Plaintiff to

1 interact with family and loved ones "in foreign ways" and to
2 experience thoughts of suicide and hopelessness (id.). Plaintiff
3 alleges violations of the Eighth Amendment and the Equal Protection
4 Clause (Complaint, p. 5).

5
6 Plaintiff alleges that Warden Banks is liable because the Warden
7 oversees "an administration that failed to perform its duties"
8 (Complaint, p. 3). Warden Banks allegedly permitted unlawful
9 conditions to exist, engaged in conspiracy, refused to allow a proper
10 investigation, and acted as an "accessory" (id., p. 5 & attachment to
11 p. 5, p. 1). Defendant Tellez allegedly "neglect[ed] his duty that
12 caused a breach of safety" (id., p. 3). Tellez allegedly engaged in
13 conspiracy and breached a contract and duty to Plaintiff by failing to
14 intervene and prevent "a serious crime of criminal misconduct by staff
15 members" (Complaint, attachment to p. 5, p. 2). Defendant Grimsley
16 allegedly permitted civil and human rights violations to occur under
17 his supervision (id.). Defendant Walker allegedly conspired to commit
18 "a serious crime of criminal misconduct" (id., p. 4).

19
20 Plaintiff seeks damages in the total sum of twenty million
21 dollars (\$20,000,000), and an injunction: (1) restraining prison
22 officials from subjecting Plaintiff to retaliation "as a means of
23 vengeance [sic]"; (2) requiring an outside investigation; (3) requiring
24 that Defendants be put on leave of absence without pay until the
25 conclusion of an investigation; and (4) placing any transfers of
26 Plaintiff on hold until the conclusion of an investigation (Complaint,
27 attachment to p. 6). Plaintiff indicates "that an in camera meeting
28 could possibly bring resolution to each complaint, on an

1 administrative level, which could perhaps, lead to negotiable
2 compinsation [sic] outside of court" (id.).

4 DISCUSSION

5
6 Although the Complaint purports to allege claims pursuant to 42
7 U.S.C. section 1983, section 1983 provides no remedy for the actions
8 of federal officials acting under color of federal law. See
9 Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). The Court
10 construes the Complaint to attempt to allege claims under the
11 authority of Bivens v. Six Unknown Named Agents of the Federal Bureau
12 of Narcotics, 403 U.S. 388 (1971) ("Bivens").¹

14 1. OFFICIAL CAPACITY CLAIMS

15
16 To the extent Plaintiff sues federal prison officials in their
17 official capacities, the action must be construed as one against the
18 federal government. See Kentucky v. Graham, 473 U.S. 159, 165-66
19 (1985); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (suit
20 against IRS employees in their official capacities "essentially a suit
21 against the United States"; citation omitted). "Absent a waiver,
22 sovereign immunity shields the Federal Government and its agencies
23 from suit." Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475
24 (1993). The United States has not waived sovereign immunity with
25 respect to constitutional claims for damages. Rivera v. United

27 ¹ A Bivens action is the "federal analog" to a section
28 1983 action. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948
(2009).

1 States, 924 F.2d 948, 951 (9th Cir. 1991); Thomas-Lazear v. Federal
2 Bureau of Investigation, 851 F.2d 1202, 1207 (9th Cir. 1988). The
3 doctrine of sovereign immunity bars Plaintiff's constitutional claims
4 for damages against any federal prison official in his or her official
5 capacity. See Hodge v. Dalton, 107 F.3d 705, 707 (9th Cir.), cert.
6 denied, 522 U.S. 815 (1997) (doctrine of sovereign immunity extends to
7 federal employees in their official capacities).

8
9 Because Plaintiff may not proceed against Defendants in the
10 official capacities, Plaintiff's Complaint is dismissed with prejudice
11 as to these claims. Plaintiff may not amend his Complaint to allege
12 official capacity claims against Defendants.

13 14 **2. SUPERVISORY CLAIMS**

15
16 Plaintiff may not sue supervisory prison officials on a theory of
17 respondeat superior. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948
18 (2009) ("Government officials may not be held liable for the
19 unconstitutional conduct of their subordinates on a theory of
20 respondeat superior"); Polk County v. Dodson, 454 U.S. 312, 325 (1981)
21 (same; section 1983 case). "[A] plaintiff must plead that each
22 Government-official defendant, through the official's own individual
23 actions, has violated the Constitution." Ashcroft v. Iqbal, 129 S.
24 Ct. 1948. A supervisor "is only liable for his or her own
25 misconduct," and is not "accountable for the misdeeds of [his or her]
26 agents." Id. at 1948-49. Mere knowledge of a subordinate's alleged
27 misconduct is insufficient. Id. at 1949.

1 Plaintiff does not allege any facts showing that Defendants
2 Banks, Tellez, Grimsley, and Walker were personally involved in the
3 actions that allegedly caused harm to Plaintiff. Instead, Plaintiff
4 alleges facts against these Defendants only in a supervisory capacity.
5 If Plaintiff wishes to amend his Complaint, he must allege facts
6 establishing that these Defendants were personally involved in the
7 events at issue in the Complaint. These claims are accordingly
8 dismissed without prejudice.

9 10 **3. EQUAL PROTECTION CLAIMS**

11
12 Plaintiff's Equal Protection claim is insufficient. To state an
13 Equal Protection claim, Plaintiff must allege that he was
14 intentionally treated differently from others similarly situated and
15 that there was no rational basis for the difference in treatment. See
16 Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Barren v.
17 Harrington, 152 F.3d 1193, 1194-95 (9th Cir. 1998), cert. denied, 525
18 U.S. 1154 (1999). The Complaint contains no such allegations.
19 Plaintiff may, however, be able to cure any defects with respect to
20 this claim in an amended Complaint. The Equal Protection Clause claim
21 is accordingly dismissed without prejudice.

22 23 **4. EIGHTH AMENDMENT CLAIM**

24
25 Plaintiff's remaining claim asserts that Defendant Caston
26 violated Plaintiff's Eighth Amendment right to be free from cruel and
27 unusual punishment. Plaintiff alleges that Defendant Caston "put an
28 unknown white pill" in Plaintiff's food, thereby causing physical and

1 mental harm to Plaintiff.

2
3 Under Rule 8 of the Federal Rules of Civil Procedure, a
4 plaintiff's complaint "must contain sufficient factual matter,
5 accepted as true, to 'state a claim to relief that is plausible on its
6 face.'" Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949 (2009)
7 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)). "A
8 claim has facial plausibility when the plaintiff pleads factual
9 content that allows the court to draw the reasonable inference that
10 the defendant is liable for the misconduct alleged." Id. A complaint
11 that offers mere "labels and conclusions" or "a formulaic recitation
12 of the elements of a cause of action will not do." Id.; see also Moss
13 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing
14 Iqbal, 129 S.Ct. at 1951).

15
16 Here, Plaintiff's Complaint contains bare "conclusions" rather
17 than "factual content." Plaintiff does not allege any facts that
18 support his belief that Defendant Caston personally placed the pill in
19 Plaintiff's food. Plaintiff may be able to cure this defect by
20 alleging "sufficient factual matter" to support the inference that
21 Defendant Caston personally engaged in wrongful conduct with respect
22 to Plaintiff.

23
24 The Eighth Amendment claims are accordingly dismissed without
25 prejudice.

26
27 ///

28 ///

ORDER

For the foregoing reasons, the Complaint is dismissed with prejudice to the extent that it asserts claims against Defendants in their official capacities, and the Complaint is dismissed without prejudice to the extent that it asserts claims against Defendants in their individual capacities. If Plaintiff still wishes to pursue this action, he is granted thirty (30) days from the date of this Memorandum and Order within which to file a First Amended Complaint. The First Amended Complaint shall be complete in itself. It shall not refer in any manner to any prior complaint. Failure to file timely a First Amended Complaint may result in the dismissal of this action.

DATED: December 15, 2009

A handwritten signature in dark ink, appearing to read "Stephen V. Wilson", is written over a horizontal line.

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE